The Digital Markets Act between competition and regulation

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The policy rationale for the DMA is twofold:

i. The alleged scope of application of competition rules (Articles 101 and 102) is limited to certain types of market power (e.g., a dominant position in specific markets) and anti-competitive conduct; their application is ex post and requires a thorough case-by-case investigation of often very complex facts (Recital 5); and therefore ex ante harmonized rules need to be established.

ii. Ensure the proper functioning of the internal market, and avoid fragmentation due to the risk of divergent regulatory solutions adopted in different Member States (Recitals 6 and 7).

Therefore:

a) It is necessary to establish harmonized rules to ensure that markets in the digital sector in which gatekeepers are present are fair and contestable (Article 1.1).

b) To avoid fragmentation, it is necessary to prevent Member States from applying specific national rules for the types of undertakings and services covered by the DMA (Recital 9). Therefore, Member States cannot impose further obligations on gatekeepers by law, regulation or administrative action, for the purpose of ensuring fair and contestable markets. Member States can impose obligations that pursue other legitimate public interests, such as consumer protection or the fight against unfair competition, including on providers of core platform

services, but such obligations must not be related to their gatekeeper status (Article 1.5).

c) At the same time, since the Regulation is intended to complement the application of competition law, it is without prejudice to the application of Articles 101 and 102, national competition rules (that prohibit agreements, decisions of associations of undertakings, concerted practices and abuses) and those that prohibit other forms of unilateral conduct insofar as they apply to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers. The application of the latter rules should not affect the obligations imposed on gatekeepers under the DMA and their uniform and effective application in the internal market. The merger control rules are also unaffected (Recital 9, Article 1.6).

d) The DMA pursues a complementary but different objective to Articles 101 and 102 and the corresponding national rules:

   - The objective of the DMA is to ensure that markets are and remain fair and contestable, regardless of actual, likely, or presumed effects on competition.

   - The objective of the competition rules is to protect undistorted competition on the market.

     Therefore, it concerns <u>different legal interests</u> (Recital 10).

e) The national authorities must not adopt decisions that conflict with a decision of the European Commission under the DMA. The European Commission and Member States must work in close cooperation and coordination in enforcement actions (Article 1.7).

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I would question whether the basic assumption for the DMA, that competition law is not sufficient to regulate digital markets, is correct and whether the structure of relations between the DMA and national rules is such that it avoids fragmentation and protects the internal market.

1. <u>The assumption that competition law is insufficient to regulate digital markets is not necessarily correct</u>

   The problem is not the limited scope of competition law, but possibly the intensity and efficiency of application.

   In fact, in recent years there has been a significant increase in the activities of the European Commission and the national authorities in applying competition rules in digital markets:

   - New and more sophisticated "*theories of harm*" have been developed.

   - There have been many new abuse cases, not only exclusionary abuse but also exploitative abuse (e.g., excessive pricing).

   - The European Commission has used the "*interim measures*" procedure (in Broadcom) after twenty years, and, it has already been used for some time, by the national authorities.

   - There has been debate about the role of relevant market definition for the purposes of determining the existence of a dominant position and the European Commission's redefinition of the notion.

- There has been a new interpretation by the European Commission of Article 22 of the Merger Regulation, which allows transactions below the national thresholds to be sent to the European Commission (to review so-called killer acquisitions).

- Google, Apple, Facebook, and Amazon (and to some extent Microsoft) are subject to a large number of proceedings and investigations at both EU and national level, as well as in the rest of the world.

- The EU General Court's confirmation of the European Commission's *Google Shopping* decision paves the way for a very broad application of Article 102.

2. In addition, Member States are strengthening national competition and economic dependence rules

   In Germany, the rules have been amended to allow for the determination of the existence of "*market power*" at much less stringent levels than those required to determine the existence of a dominant position.

   In Italy, the recent draft law presumes the existence of economic dependence in the event that a business uses the intermediation services provided by a digital platform that plays a decisive role in reaching end users or suppliers, including in terms of network effects or data availability.

These rules reinforce national procedures that apply to the unilateral conduct of undertakings. Therefore, according to Article 3.2 of Regulation 1/2003, there is nothing to prevent Member States from adopting and applying on their territory stricter national rules prohibiting and sanctioning the conduct of undertakings.

V. Recital 9 and Article 1.6 of the DMA, which indicates that the DMA is without prejudice to the application of Articles 101 and 102, the national competition

rules, including those prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligation on gatekeepers.

3. Complementarity or overlap?

From a regulatory perspective, there is a clear position of exclusivity for the DMA, as Article 1.5 prevents Member States from imposing additional obligations through laws, regulations and administrative action for the purpose of ensuring fair and contestable markets and allows Member States to impose obligations that pursue other public interests, but only on the basis of general, not platform-specific, rules.

The situation from the perspective of competition rules is different.

Although the DMA refers to complementarity, there is no doubt that there is a clear overlap between the DMA and the competition rules.

- First of all, the DMA is the result of the downsizing of the New Competition Tool, which was intended to strengthen the European Commission's powers to apply competition rules in the digital market.

- The obligations imposed by the DMA, all of those in Article 5 and most of those in Article 6, are clearly derived from competition case law. They translate into ex ante obligations cases decided on the basis of competition rules.

- Furthermore, the DMA is without prejudice to the application of the competition rules, both Articles 101 and 102, and the national rules. A case that is subject to one of the ex-ante obligations under the DMA, may also be subject to an ex post application of the competition rules by both the European Commission and the national authorities, which may apply both Articles 101 and 102 and the national rules.

- To the extent that, as Recital 10 states, the legal interests, protected by the DMA and competition law should be regarded as different, the parallel application of the DMA and competition law would not pose a ne bis in idem problem. This is supported by the brilliant interpretation of the ne bis in idem principle in the excellent Conclusions of Advocate General Bobek of September 2, 2021 in the *bPost SA v. Autorité belge de la concurrence* case.

- Furthermore, while in the case of application of Article 102 by the National Authorities, the European Commission may decide to initiate proceedings depriving, pursuant to Article 11(6) of Regulation 1/2003, the National Authority of the competence to apply Article 102, such a mechanism does not exist in the case where the National Authority applies national rules prohibiting or sanctioning the unilateral conduct of companies (Article 3.2 of Regulation 1/2003).

It is therefore clear that in order to avoid fragmentation and protect the internal market, maximum cooperation and coordination between the European Commission and the National Authorities is needed. Since this coordination is necessary for the application of the competition rules, it seems to me absolutely crucial that on the European Commission side, the Directorate-General for Competition should be responsible for the application of the DMA, and that on the national side, the national competition authorities should be the authorities designated to cooperate with the European Commission in the application of the DMA. Only this solution can ensure the best cooperation and reduce the risk of fragmentation.

4. On the goals of the DMA: ensuring fair and contestable markets

Most of the obligations imposed on platforms under Articles 5 and 6 of the DMA appear to have as their primary objective fairness in the relationship between platform service providers and business users and end users. The focus of the DMA is on the ability of platforms to connect many business users with many end users through their services, which allows them to leverage advantages gained in one area of their activity, such as access to large amounts of data, into new areas (Recital 3).

There is no doubt that ensuring fairness in dealings with users also improves competition between platforms. But this is rather an indirect effect of the obligations in Articles 5 and 6, since the main objective of the DMA seems in practice to be to create intra-platform, not inter-platform, competition.

Indeed, the DMA allows platforms to remain vertically integrated and operate across multiple markets and entire ecosystems, provided that there is competition within platforms (intra-platform competition) and fairness in dealing with users.

Virtually all of the obligations imposed by Articles 5 and 6 ensure intra-platform competition. Indeed, the access and interoperability obligation is imposed only on "*business users and providers of ancillary services*" not on service providers of competing platforms (Article 6.1(f)).

The only obligation that directly addresses the issue of contestability by competing platforms (i.e., inter-platform competition) is Article 6.1(j), according to which third-party online search providers must be granted access on FRAND (fair, reasonable, and non-discriminatory) terms to ranking, query, click, and view data in relation to searches (free and paid) generated by end users on gatekeeper search engines.

This obligation is aimed at online search providers, to improve their services and compete on the market with incumbent platforms. Of course, the access obligation refers only to simple data provided by users, not to data processed by the platform.

The obligation is almost structural in nature, as it obligates the gatekeeper to share with competitors one of its most important assets, data. All of the other obligations in Articles 5 and 6 are behavioral in nature.

5. Remedies in the case of infringement of obligations under Articles 5 and 6

Article 16.1 of the DMA provides that in the event that:

(i) the gatekeeper systematically infringes the obligations in Articles 5 and 6; and

(ii) has further strengthened or extended its position as gatekeeper,

the European Commission may impose any behavioral or structural remedy proportionate to the infringement committed and necessary to ensure compliance with the regulation.

Article 16.2 provides that the European Commission may only impose structural remedies if:

- There is no equally effective behavioral remedy, or
- An equally effective behavioral remedy would be more burdensome for the gatekeeper concerned than the structural remedy.

(This is identical to the text of Article 7(1) of Regulation 1/2003).

The only definition of structural remedies is in Recital 64:

"*Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it*".

Therefore, there can be two categories of structural remedies:

- Unbundling rules.

- Divestiture.

To the extent that the fundamental objective of the DMA is to ensure "*intra-platform competition*", it would appear to be more appropriate to impose unbundling rules, specifically legal or functional separation, rather than structural separation or divestiture.